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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2012 JAN 13 PM 4:19

CLERK
BY: J. Hars

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF YAVAPAI, STATE OF ARIZONA

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300 CR2010-01325

**RESPONSE TO STATE'S MOTION FOR
DEPOSITION OF JAMES DEMOCKER
AND MOTION TO QUASH SUBPOENA**

(Oral Argument/Evidentiary Hearing
Requested)

James DeMocker, by and through counsel undersigned, hereby responds to the State's Motion for Deposition of Witness James DeMocker. DeMocker opposes the State's Motion and the Subpoena Duces Tecum issued by the State in August of 2011. This response is based upon the entire record before the Court, as well as upon the attached Memorandum of Points and Authorities.

DATED this 13th day of January, 2012.

ASPEY, WATKINS & DIESEL, P.L.L.C.

By


Bruce S. Griffen
Attorneys for Defendant

I. FACTS

- Any and all records, correspondence, hand-written and or electronic notes, vouchers, expense lists, emails, financial records, spread sheets, Excel spread sheets, Power(s) of Attorney, records from all financial institutions, credit card companies; loan companies; mortgage companies, UBS, vehicle loans/leases, Homeowner's Associations; student loan, dunning notices from collection agencies,
- Fee agreements identifying or referring to John Sears, Larry Hammond, Anne Chapman, Osborn-Maledon, John DeMocker, Janice DeMocker, James DeMocker and/or Susan DeMocker, Robert Schmidt, Dan Wilson, Christopher Kottke, Katherine DeMocker and or Richer Robertson;
- All financial records, correspondence, emails, instructions, notes regarding the Hartford Insurance proceeds,
- Spreadsheets re: Probate estate of Virginia Carol Kennedy;
- All financial records, correspondence, emails, instructions, notes, spreadsheets re: the payment of attorney fees by Janice DeMocker, John DeMocker;
- Any and all records, correspondence, emails, notes, spreadsheets of John DeMocker, Janice DeMocker, James DeMocker, Susan DeMocker, Renee Girard relating, referring or pertaining to Steven DeMocker's financial affairs, personal loans from John DeMocker, Janice DeMocker and any member of the DeMocker family;
- Emails, correspondence, notes, spreadsheets re: Renee Girard as trustee of Testamentary Trust of Virginia Carol Kennedy;

- Any and all financial records, accounts, correspondence, notes, spreadsheets, or other information regarding monies held or controlled, received or held by you [James DeMocker] or someone on your behalf for Steven DeMocker from October 23, 2008 to today's date.

A copy of this subpoena is attached as Exhibit A. This subpoena is not issued by the clerk of Yavapai County Superior Court, nor by the State Bar of Arizona, and does not command James DeMocker to appear either at a Grand Jury or at trial.

This subpoena was served by Rhonda Grubb, who, according to the Certificate of Service, completed service by mailing the subpoena overnight via Federal Express to James DeMocker's business address in Washington, D.C. The State has submitted the Federal Express packing slip and an email from TrackingUpdates@fedex.com to prove that service of the subpoena was properly made upon James DeMocker. The email cites records that show that the FedEx package was delivered on September 7, 2011, and was signed for by ".RESESNDNEZ." A copy of this email is attached as Exhibit B.

The State has not offered James DeMocker immunity in regards to the requested documents and has not been willing to narrow the scope of the subpoena. The State has also noted that there is no guarantee that it will not seek charges against James DeMocker relating to the prosecution of Steven DeMocker.

On Monday, January 9, 2012, this Court ordered that James DeMocker, if he chose to respond to the State's Motion for Deposition, must do so by Friday, January 13, 2012. Trial of Steven DeMocker is scheduled for April, 2012.

II. LAW

1 **A. Rule 15.3 of the Arizona Rules of Criminal Procedure**

2 Rule 15.3 of the Ariz. R. Crim. P. addresses the taking of depositions in
3 criminal cases. The Rule states that a court may order deposition of any person except
4 the defendant and victim(s) if “the person’s testimony is material to the case or
5 necessary adequately to prepare a defense or investigate the offense, that the person
6 was not a witness at the preliminary hearing..., and that the person will not cooperate
7 in granting a personal interview.” Ariz. R. Crim. P. 15.3(a)(2).
8
9

10 The party seeking a deposition must file a motion for deposition, specifically
11 stating the time and place for taking the deposition, the name and address of each
12 person to be examined, together with designated papers, documents, photographs, or
13 other tangible objects, not privileged, to be produced at the same time and place. Ariz.
14 R. Crim. P. 15.3(c). The Court has power to change terms and specify conditions
15 regarding the proceedings. *Id.* The party seeking the deposition must “notice the
16 deposition in the manner provided for in civil actions and serve a subpoena upon the
17 deponent, specifying the terms and conditions set forth in the court’s order granting the
18 deposition, and give notice of the deposition in writing to every other party to the
19 action.” *Id.*
20
21

22 **B. Issuance and Service of Subpoenas under the Arizona Criminal Code**

23 A.R.S. § 13-4071 and § 13-4072 govern the issuance and service of subpoenas
24 in a criminal case. A.R.S. § 13-4071(B)(2) states that a county attorney may issue a
25 subpoena for witnesses to appear at a grand jury or at a trial. All other subpoenas
26

1 must be signed and issued by a magistrate or the clerk of the court. A.R.S. § 13-
2 4071(B)(1), (3).

3
4 A subpoena must be served either by personal service, certified mail, or first
5 class mail with certificate of service and return card, if the return card is returned by
6 the addressee. A.R.S. § 13-4072(B)

7
8 **C. Rule 45 of Arizona Rules of Civil Procedure**

9 In addition to the statutes on issuance and service of subpoenas in a criminal
10 case, the Arizona courts incorporate the Rules of Civil Procedure in the issuing of
11 subpoenas, as stated in Ariz. R. Crim. 15.3(c), cited below. Rule 45 of the Ariz. R.
12 Civ. P. addresses the scope and procedures for issuing of subpoenas and Rule 45(c)
13 governs subpoenas for production of documentary evidence.

14
15 Ariz. R. Civ. P. 45(a)(2) requires that a subpoena be issued either by a clerk of
16 the court, or by the State Bar of Arizona. Rule 45(d)(1) requires that service of a
17 subpoena be made by "delivering a copy to the named person."

18 Rule 45(c)(5) covers the form and time for objections to subpoenas and Rule
19 45(e) outlines the protections recognized under Arizona law for persons who are
20 subject to a subpoena. Rule 45(e)(1) requires that "an attorney responsible for the
21 service of a subpoena shall take reasonable steps to avoid imposing undue burden or
22 expense on a person subject to that subpoena" and allows for the court to award
23 attorney's fees in a case in which the issuing attorney breaches this duty. Rule
24
25
26

1 45(e)(2)(A)(iv) *requires* the quashing or modifying of a subpoena when such subpoena
2 subjects a person to an undue burden.
3

4 **D. Rule 15.2 of the Arizona Rules of Criminal Procedure**

5 Ariz. R. Crim. P. 15.2(g) allows for disclosure by order of the court if a
6 prosecutor has made a showing of substantial need for material or information and that
7 prosecutor is unable to obtain the substantial equivalent of such material or
8 information by other means without undue hardship. This Rule allows the court to
9 order any person to make such material or information available to the prosecutor, and
10 also allows the court to vacate or modify its order if compliance would be
11 unreasonable or oppressive. Ariz. R. Crim. P. 15.2(g).
12

13 **E. Service on Out of State Witness**

14 Rule 4.2(c) of the Ariz. R. Civ. P. addresses service of process on out-of-state
15 parties. This rule allows service by mail "by depositing the summons and a copy of
16 the pleading being served in the post office, postage prepaid, to be sent to the person to
17 be served by any form of mail requiring a signed and returned receipt." Ariz. R. Civ.
18 P. 4.2(c). The rule requires that, when the serving party receives the signed receipt,
19 that party must file an affidavit stating:
20
21

- 22 1. That the party being served is known to be located outside the state;
- 23 2. That the summons and a copy of the pleading were dispatched to the
24 party being served;
- 25 3. That such papers were in fact received by the party as evidenced by
the receipt, a copy of which shall be attached to the affidavit; and
- 26 4. The date of receipt by the party being served and the date of the
return of the receipt to the sender.

1
2 **F. Fifth Amendment to the U.S. Constitution**

3 The Fifth Amendment to the U.S. Constitution guarantees that no person "shall
4 be compelled in any criminal case to be a witness against himself." U.S. Const.,
5 Amend. V. The Arizona Ariz. Const. Art. II, § 10.
6

7 **III. ARGUMENT/ANALYSIS**

8 James DeMocker objects to this Court's jurisdiction over him and over the
9 materials requested by the State. James DeMocker does not waive either the
10 arguments of personal jurisdiction or improper service by this Response.
11

12 In addition to the general objection regarding jurisdiction, James DeMocker
13 raises the following arguments and objections regarding the State's subpoena.

14 **A. This Court does not have personal jurisdiction over James DeMocker**

15 James DeMocker lives in Virginia, and is therefore outside of the power of this
16 Court to hold him in contempt or to order him to comply with Court orders for
17 discovery. By this Response, James DeMocker does not waive any objection to
18 jurisdiction over him.
19

20 Additionally, James DeMocker is not a party to this case, and is thereby outside
21 of the Court's power to order compliance with discovery requests.
22

23 **B. The State has not met the requirements for ordering a deposition of
24 James DeMocker.**

25 The State has not met the requirements for this Court to order a deposition of
26 James DeMocker. As cited above, a court may order a deposition of any party or

1 witness, if the party requesting the deposition shows that there is a substantial
2 likelihood that the person will not be available at the time of trial, or that the person's
3 testimony is material to the case and that person will not cooperate in granting a
4 personal interview. Ariz. R. Crim. P. 15.3(a)(1), (2).
5

6 The State has not shown either that there is a likelihood that James DeMocker
7 will not be available at the time of trial, nor that he is not cooperative in granting a
8 personal interview. In its Motion for Deposition, the State cites only that James
9 DeMocker has not responded to the State's subpoena, and that "after numerous phone
10 calls and emails with Mr. Griffen, the State has been unable to receive [James
11 DeMocker's] records or to schedule his interview" as the only evidence that James
12 DeMocker is not cooperating in granting a personal interview. James DeMocker has
13 not shown that he is not willing to grant a personal interview, and the difficulties of
14 scheduling an interview with him, while he is living in Virginia, do not prove that he is
15 not cooperative. James DeMocker does not dispute that he has not responded to the
16 State's subpoena, but his lack of response is based upon the challenges to the subpoena
17 described below.
18
19
20

21 **C. The subpoena was not issued by a court and is, therefore, invalid.**

22 The subpoena issued to James DeMocker was not issued by a court, and was
23 signed only by Deputy Yavapai County Attorney Jeffrey G. Paupore. The subpoena
24 commands James DeMocker to produce specific documents, which the county
25 attorney does not have authority to do under A.R.S. § 13-4071(B)(2). The subpoena
26

1 does not require James DeMocker to appear to testify before the grand jury, or at trial,
2 which the county attorney would have had the power to order under A.R.S. § 13-
3 4071(B)(2).
4

5 Additionally, neither the clerk of the Court, nor the State Bar of Arizona issued
6 the subpoena. Ariz. R. Civ. P. 45(a)(2).

7 Deputy County Attorney Jeffrey G. Paupore simply does not have authority to
8 order James DeMocker to produce discovery materials. While the subpoena bears the
9 heading of the Yavapai Superior Court, it is a demand issued by the Office of the
10 County Attorney, and is not a valid subpoena.
11

12 **D. The subpoena was not properly served upon James DeMocker.**

13 Under A.R.S. § 13-4072(B), a subpoena may be served by personal service,
14 certified mail, or first class mail with a certificate of service and return card, if the
15 return card is returned by the addressee. The State sent the subpoena to James
16 DeMocker via Federal Express and submitted an email from
17 TrackingUpdates@fedex.com to prove that service of the subpoena was properly made
18 upon James DeMocker. The email cites records that show that the FedEx package was
19 delivered on September 7, 2011, and was signed for by ".RESESNDNEZ." This
20 service was not proper under A.R.S. § 13-4072(B).
21
22

23 Additionally, Ariz. R. Civ. P. 45(d)(1) requires that service of a subpoena be
24 made by "delivering a copy to the named person." Service via FedEx does is not
25 delivering a copy to the named person. Even if this Court determines that the general
26

1 Rule of Civil Procedure pertaining to service of process applies, Rule 4.2(c), applies,
2 the State did not comply with the requirements of process in proving that the subpoena
3 was properly delivered to James DeMocker. The noted signature of
4
5 “.RESESNDNEZ” on the email from FedEx is not James DeMocker’s signature.

6 **E. The subpoena is overbroad and imposes an undue burden upon James**
7 **DeMocker.**

8 Ariz. R. Civ. P. 45(e)(1) requires that “an attorney responsible for the service of
9 a subpoena shall take reasonable steps to avoid imposing undue burden or expense on
10 a person subject to that subpoena” and allows for the court to award attorney’s fees in
11 a case in which the issuing attorney breaches this duty. Rule 45(e)(2)(A)(iv) *requires*
12 the quashing or modifying of a subpoena when such subpoena subjects a person to an
13 undue burden.
14

15 Requesting “[y]our complete file from October 23, 2008 to today’s date
16 referring, relying, and or pertaining to Yavapai County Superior Court Cases titled the
17 *State of Arizona v. Steven DeMocker*” imposes an undue burden upon James
18 DeMocker. Requiring James DeMocker to produce voluminous private
19 communications, records, and other documents without any showing of need from the
20 State is merely a fishing expedition in which the State seeks to gather evidence that it
21 is not even sure exists, and which it might use to attempt to charge James DeMocker
22 with a crime.
23
24

25 The State’s command of James DeMocker to produce the documents listed in
26 the subpoena also imposes an undue burden on him because many such documents are

1 private and are not appropriate for public disclosure. Specifically, it is an undue
2 burden for James DeMocker to be ordered by the State, without any showing of
3 substantial need, to produce private emails between family members at a time when
4 the family was struggling with exceedingly difficult circumstances
5

6 **F. The State's subpoena is merely an end-run around the requirements of**
7 **Ariz. R. Crim. P. 15.2(g).**

8 The State's effort to subpoena voluminous records from James DeMocker is
9 merely an end-run around the requirements of Ariz. R. Crim. P. 15.2(g). This Rule, on
10 Disclosure on Order of the Court, requires that the prosecutor show, in order for a
11 court to order production of materials or information, that the prosecutor has
12 substantial need for the material or information requested, that the prosecutor is unable
13 without undue hardship to obtain the substantial equivalent by other means, and that
14 disclosure will not violate the person's constitutional rights. Ariz. R. Crim. P. 15.2(g).
15

16 The State has not made any such showing in its subpoena, nor in its Motion for
17 Deposition of James DeMocker. In its Motion, the State outlined possible reasons
18 why James DeMocker himself might be a material witness, but has not outlined a
19 substantial need for any of the requested materials. The State has also not made any
20 showing that it cannot obtain substantial equivalents by other means without undue
21 hardship, nor that disclosure will not violate James DeMocker's constitutional rights.
22
23

24 **G. James DeMocker cannot be compelled to be a witness against himself**
25 **under the Fifth Amendment to the U.S. Constitution.**
26

1 The State has not offered immunity to James DeMocker and has indicated that
2 it may have probable cause to charge him with a crime in relation to the requested
3 documents. James DeMocker asserts his right not to be compelled to be a witness
4 against himself under the Fifth Amendment to the U.S. Constitution and under Art. II,
5 § 10 of the Arizona Constitution.
6

7 **H. Many of the documents James DeMocker is commanded to produce are**
8 **not in his possession.**

9 The State has ordered the production of many documents that are not in James
10 DeMocker's possession. He does not possess any of the attorney fee agreements
11 referring to several other family members and is not in possession of many of the
12 "correspondence" categories of documents.
13

14 **IV. CONCLUSION**

15 James DeMocker, without submitting to this Court's jurisdiction over him and
16 without waiving the argument that the invalid subpoena was not properly served,
17 submits that the subpoena in this matter is not valid, has not been properly served, is
18 overbroad, and imposes an undue burden upon him.
19

20 **DATED** this 13th day of January, 2012.

21 **ASPEY, WATKINS & DIESEL, P.L.L.C.**

22
23 By 

24 Bruce S. Griffen
25 Attorneys for Defendant
26

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2
3
4 COPY of the foregoing emailed
this 13th day of January, 2012, to:

5 Honorable Gary Donahoe
6 Division 1
7 Yavapai County Superior Courts
Via email to: gdonahoe1@courts.az.gov

8 Division 1
9 Via email to Cheryl Wagster: CWagster@courts.az.gov

10 Craig Williams
11 Attorney for Defendant
12 P.O. Box 26692
13 Prescott Valley, AZ 86312
Via email to: craigwilliamslaw@gmail.com

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17 Daniela De La Torre
18 Attorney for Victim
19 Charlotte DeMocker
245 W. Roosevelt, Suite A
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22 Melody G. Harmon
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Steve Young
Deputy Yavapai County Attorney
Via email to: Steve.young@co.yavapai.az.us

Jeffrey Paupore
Deputy Yavapai County Attorney
Via email to: Jeffrey.Paupore@co.yavapai.az.us

By: K. Mahaly

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

NO. P1300CR201001325

Division PTB

SUBPOENA DUCES TECUM

**TO: James DeMocker
6615 Heidi Court
McLean, VA 22101-1606**

YOU ARE HEREBY COMMANDED to produce for examination and copying by the Yavapai County Attorney's Office the following described records on or before 9:00 A.M. on September 14th, 2011:

Your complete file referring, relying, and or pertaining to all of the Yavapai County Superior Court Cases titled the *State of Arizona v. Steven DeMocker*, or any of his representatives including but not limited to any and all records, correspondence, hand written and or electronic notes, vouchers, expense lists, emails, financial records, spread sheets, Excel calculations, Power(s) of Attorney, records from all financial institutions, credit card companies; loan companies; mortgage companies, UBS, vehicle loans/leases, Homeowner's Associations; student loan, dunning notices from collection agencies, fee agreements identifying or referring to John Sears, Larry Hammond, Anne Chapman, Osborn- Maledon, John DeMocker, Janice DeMocker, James DeMocker and/or Susan DeMocker, Robert Schmidt, Dan Wilson, Christopher Kottke, Katherine DeMocker and or Rich Robertson; all financial records, correspondence, emails, instructions, notes, Hartford Insurance proceeds, spreadsheets re: Probate estate of Virginia Carol Kennedy; the Hartford Insurance Company; all financial records, correspondence, emails, instructions, notes, spreadsheets re: the payment of attorney fees by Janice DeMocker, John DeMocker; any and all records, correspondence, emails, notes, spreadsheets of John DeMocker, Janice DeMocker, James DeMocker, Susan DeMocker, Renee Girard relating, referring or pertaining to Steven DeMocker's financial affairs, personal loans from John DeMocker, Janice DeMocker and any member of the DeMocker family; emails, correspondence, vouchers, expenses re: payments for Steven DeMocker or on his behalf by James DeMocker to Renee Girard and any member of the DeMocker family; any and all records, emails, correspondence, notes, spreadsheets re: Renee Girard as trustee of Testamentary Trust of Virginia Carol Kennedy; any and all financial records, accounts, correspondence, notes, spreadsheets, or other information regarding monies held or controlled, received or held by you or someone on your behalf for Steven DeMocker from October 23, 2008 to today's date.

The above records include all formats including but not limited to handwritten, typed, or electronic format.

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Compliance may be made either on the specified date by delivery to the Yavapai County Attorney's Office or prior to that date by delivery to:

Randy Schmidt, Investigator
Yavapai County Attorney's Office
255 E. Gurley St, 2nd floor
Prescott, AZ 86301

Given under my hand this _____ day of August, 2011.

SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

**IF YOU FAIL TO APPEAR AS
ORDERED OR FAIL TO PRODUCE
THE REQUESTED RECORDS A WARRANT**

WILL BE ISSUED FOR YOUR ARREST.

By:



Jeffrey G. Paupore
Deputy County Attorney

CERTIFICATE OF SERVICE**

The undersigned swears that he/she is qualified to serve this subpoena and did so by showing the original to and informing the witness of its contents and by delivering a copy thereof to him at _____, m. on _____, 2011, at _____, Arizona.

Person Serving Subpoena

**** see FedEx email delivery notice below.**

This tracking update has been sent to you by FedEx on the behalf of the Requestor noted above. FedEx does not validate the authenticity of the requestor and does not validate, guarantee or warrant the authenticity of the request, the requestor's message, or the accuracy of this tracking update. For tracking results and fedex.com's terms of use, go to [fedex.com](https://www.fedex.com).